

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LUZ E. MATOS and U.S. POSTAL SERVICE,  
POST OFFICE, East Hartford, CT

*Docket No. 98-2313; Submitted on the Record;  
Issued August 15, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant has greater than an 8 percent permanent impairment of the left lower extremity and a 10 percent impairment of the right upper extremity, for which she has received schedule awards.

The Office of Workers' Compensation Programs accepted that appellant sustained a low back strain, a herniated intervertebral disc at L4-5, and a herniated intervertebral disc at C6-7, for which she underwent an excision of the L4-5 disc on January 6, 1993 and an anterior cervical discectomies at C4-5, C5-6 and C6-7 in August 1993. Concurrent disability not due to the accepted injuries was noted to include disc degeneration at L4-5/L5-S1.

On October 16, 1996 appellant requested a schedule award for residuals affecting her extremities, causally related to her accepted back and neck injuries and/or to her consequential surgeries.

In support of her schedule award claim, appellant, through her representative, submitted a March 26, 1996 report from Dr. Daniel E. Nijensohn, a Board-certified neurosurgeon of professorial rank, who stated:

"I stated on October 30, 1995 that it is my medical opinion, based on reasonable medical probability, that [appellant] suffers from a 20 percent permanent ... disability rating of her lumbar spine and a 15 percent permanent ... disability rating of her cervical spine. In addition, she suffers from a 10 percent permanent ... rating of her left lower extremity, related to residual numbness and weakness due to the neurological deficit caused by the severe left-sided compressive lumbar radiculopathy. It is my medical opinion that [appellant] sustained a 10 percent permanent ... disability rating of her right shoulder and 10 percent permanent impairment of her right arm, also relating to residual numbness

and weakness due to the neurological deficit caused by the severe right-sided compressive cervical radiculopathy.”

Thereafter, Dr. Nijensohn submitted brief reports, dated May 3, August 2, October 11 and 18, 1996 and November 3, 1997, which addressed appellant’s complaints and described her therapy, but which did not provide any further discussion of appellant’s permanent impairments or their ratings.

On November 17, 1997 the Office determined that a second opinion evaluation was necessary and it referred appellant, together with a statement of accepted facts and questions to be answered, to Dr. James K. Sabshin, a Board-certified neurosurgeon, for a permanent impairment determination in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup>

By report dated December 22, 1997, Dr. Sabshin reviewed appellant’s history and her radiology reports, indicated physical examination results including range of neck and lower back motion measurements and noting the recent occurrence of right-sided sciatic pain, recommended a further magnetic resonance imaging scan to rule out a recurrent or residual right-sided disc herniation as causing her right lower extremity pain<sup>2</sup> and opined:

“Prior to the development of her right-sided sciatic pain, which I believe is new, I would feel that based on A.M.A., [*Guides*], she has a 25 percent disability of the cervical spine given the fact that she has had three discs removed and has continuing limitations in terms of range of motion and neurological deficits, at least in terms of numbness and also has some possible weakness of her right hand.

“In terms of her low back, I would estimate that she (prior to her development of problems in the right lower extremity) would have a disability of 15 percent of the low back based upon her need for lumbar disc excision, continuing limitations in terms of range of motion, etc.”

Dr. Sabshin reviewed the ratings of Dr. Nijensohn and opined that appellant’s disability ratings should be of her back, since the problems in her extremities were due to her neck and back. He noted that he could not rate appellant’s shoulder, as Dr. Nijensohn had done, because he was not an orthopedic surgeon and did not deal with shoulder problems.

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<sup>1</sup> A.M.A., *Guides*, Fourth Edition (1993).

<sup>2</sup> A November 4, 1996 radiologic examination report indicated only “postop[erative] changes at L4 on the left, with narrowing of the intervertebral disc space. No fracture and/or subluxation. No pelvis and/or hips bony abnormalities.”

On May 27, 1998 appellant's complete record and the medical reports of Drs. Nijensohn and Sabshin were reviewed by an Office medical adviser, Dr. George L. Cohen, who noted that upper and lower extremity neurological examination revealed normal motor, sensory and reflex testing throughout except for a decreased pin prick sensation in the right upper extremity, predominantly in a C7-type distribution and in both an S1 and L5-type distribution in the right foreleg and foot, which he opined needed further evaluation. Dr. Cohen opined:

"Using Table 83, page 130, the maximum left lower extremity impairment when nerve roots L4[-]5 are involved is 10 percent. Table 20, Class 4, page 151 allows 80 percent for pain which may prevent activity. Eighty percent of 10 percent results in 8 percent impairment of the left lower extremity. There is no additional impairment for abnormal motion.

"Using Table 13, page 51, the maximum right upper extremity impairment when nerve roots C6[-]7 is [sic] involved is 13 percent. Table 11, page 48 allows 80 percent for pain which may prevent activity. Eighty percent of 13 percent results in 10 percent impairment of the right upper extremity. There is no additional impairment for abnormal motion."

Dr. Cohen opined that the date of appellant's maximum medical improvement was October 1995.

By decision dated June 2, 1998, the Office granted appellant schedule awards for an 8 percent impairment of the left lower extremity and a 10 percent impairment of the right upper extremity, for the period October 1, 1995 to October 14, 1996, for a total of 54.24 weeks of compensation.<sup>3</sup>

The Board finds that appellant has no greater than an 8 percent permanent impairment of the left lower extremity and no greater than a 10 percent impairment of the right upper extremity, for which she has received schedule awards.

A claimant seeking compensation under the Federal Employees' Compensation Act<sup>4</sup> has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.<sup>5</sup> The schedule award provisions of the Act<sup>6</sup> and its implementing federal regulations<sup>7</sup> provide for payment of compensation for the permanent loss or loss of use of specified members, functions and organs of the body. No schedule award is payable, however, for a member, function, or organ of the body not specified in the Act or in the

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<sup>3</sup> Appellant received a lump-sum payment of \$31,863.02.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>6</sup> 5 U.S.C. § 8107(a).

<sup>7</sup> 20 C.F.R. § 10.304.

regulations.<sup>8</sup> Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,<sup>9</sup> no claimant is entitled to such an award.<sup>10</sup> Although the medical evidence in this case supports appellant's claim that she has a permanent impairment of the lumbar and cervical spines, no evidence can establish entitlement to an award not authorized under the Act.

In 1966, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the spine.<sup>11</sup> The medical evidence in this case does support that appellant sustained a permanent loss of sensation in her upper right and lower left extremities.

Appellant's attending physician, Dr. Nijensohn, opined that appellant had a 20 percent permanent impairment of her lumbar spine and a 15 percent permanent impairment of her cervical spine. As noted above, impairments of the spine are not compensable under the Act. Dr. Nijensohn's report on this aspect of her impairment does not entitle appellant to a schedule award for her back.

He opined that appellant had a 10 percent permanent impairment of her left lower extremity, related to residual numbness and weakness due to the neurological deficit caused by the severe left-sided compressive lumbar radiculopathy, a 10 percent permanent impairment of her right shoulder and 10 percent permanent impairment of her right arm, also relating to residual numbness and weakness due to the neurological deficit caused by the severe right-sided compressive cervical radiculopathy. Dr. Nijensohn, however, did not explain these ratings on the A.M.A., *Guides*.

Board cases are clear that if the attending physician does not utilize the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment.<sup>12</sup>

Dr. Nijensohn did not indicate that he applied the A.M.A., *Guides* in assessing appellant's lower left or upper right extremity permanent impairment due to neurological deficit. He simply stated that appellant had a 10 percent permanent impairment of the left lower extremity due to neurological deficit, a 10 percent impairment of her shoulder and a 10 percent

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<sup>8</sup> *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment).

<sup>9</sup> The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

<sup>10</sup> *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>11</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>12</sup> *See Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).

impairment of her upper right extremity secondary to neurological deficit, without citing any basis for this determination. Accordingly, his medical opinion is of diminished probative value.

The Office second opinion referral physician, Dr. Sabshin, based his impairment determination ratings solely on spinal impairment. As noted above, the Act does not provide for the payment of a schedule award for the permanent loss of use of the back.<sup>13</sup> Therefore, Dr. Sabshin's report on this aspect of appellant's impairment does not entitle her to a schedule award.

Dr. Cohen, the Office medical adviser, relied on Drs. Nijensohn's and Sabshin's objective findings to assess the degree of permanent impairment of appellant's left lower and right upper extremities due to neurological deficit. He properly applied the A.M.A., *Guides*, Table 83, page 130 and Table 20, page 151 for the left lower extremity, and Table 13, page 51 and Table 11, page 48 for the right upper extremity. These tables provide protocols for determining impairment due to neurological deficits. Dr. Cohen applied the A.M.A., *Guides* to calculate an 8 percent permanent impairment of the left lower extremity and a 10 percent impairment of the right upper extremity.

Board precedent is well settled that when an attending physician's report gives an estimate of permanent impairment but does not base the estimate upon proper application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.<sup>14</sup> In the instant case, Dr. Cohen properly utilized the A.M.A., *Guides* and explained which tables and pages he relied upon in calculating the degree of appellant's permanent impairment.

The medical evidence does not establish entitlement to any greater award for either her left leg or right arm.

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<sup>13</sup> See *supra* note 10.

<sup>14</sup> See *Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone* 31 ECAB 846 (1980).

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 2, 1998 is hereby affirmed.

Dated, Washington, D.C.  
August 15, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member